2014 WL 3053717 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Dorothy DURBIN, Plaintiff,

v.

HARTFORD LIFE INSURANCE COMPANY, and Does 1 through 10, Defendants.

And Related Third-Party Complaint.

No. 3:13-cv-00052-BEN-WMC.
January 13, 2014.

Defendant and Third-Party Plaintiff Hartford Life Insurance Company's Memorandum of Points and Authorities in Support of Its Motion for Summary judgment or Partial Summary Judgment on Plaintiff's Complaint

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Hon. Roger T. Benitez.

[EVIDENCE SUBMITTED SEPARATELY]

Date: February 10, 2014

Time: 10:30 a.m.

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I. INTRODUCTION & OVERVIEW

In this action, plaintiff has sued Hartford over loans allegedly issued against her life insurance policy without her authorization. Plaintiff contends the loans were actually obtained by a relative impersonating her, who was also her insurance agent, and that Hartford should reverse, pay off, or otherwise extinguish the loans.

Assuming the loans were unauthorized, plaintiff's claims are all time-barred because Hartford has notified her of the loans' existence annually since at least 1995. As a result, plaintiff was required to bring this suit no later than 1999, a deadline she missed by fourteen years.

Even had they been timely brought, plaintiff's individual claims for relief -- for breach of contract, bad faith, and **elder abuse** -- lack factual support, as do specific damages claims asserted in them.

As a result, Hartford is entitled to summary judgment on plaintiff's entire complaint. In the alternative, it is entitled to partial summary judgment on her individual claims for relief or specific elements thereof.

*** * ***

In 1988, plaintiff Dorothy Durbin, through an insurance agent named Gary Jenkins whom she considered "family," purchased a life insurance policy from Pacific Standard Life Insurance Company. Pacific Standard became insolvent in 1994, and Hartford assumed its contractual obligations.

Between 1990 and 1997, three loans were issued to plaintiff using her policy as collateral: one each in 1990 and 1992 by Pacific Standard, and a third in 1997 after Hartford assumed its policy. In March 2010, plaintiff notified Hartford that she had received no proceeds from any of the loans: rather, Mr. Jenkins had fraudulently applied for them in her name and misappropriated the proceeds. In response, Hartford offered to repay the third loan (the one it processed) but not the two that Pacific Standard issued. Plaintiff rejected the offer and instead filed this suit for breach of contract, bad faith and **elder abuse**.

Even if plaintiff's loans were unauthorized, her claims are barred by the two-and four-year statutes of limitations governing her legal claims. Between 1995 and 2012, Hartford sent Ms. Durbin no fewer than *eighteen* annual reports disclosing the outstanding balance on the loans against her policy, including accrued interest. Hartford also sent her premium notices requesting payments on the loans. Even applying the longest statute, this suit had to be filed by 1999, which it was not.

Even if the suit had been timely commenced, each of plaintiff's claims fails as a matter of law. Plaintiff's breach-of-contract claim is meritless because Hartford breached no policy provision and because plaintiff has sustained no injury. Plaintiff's bad faith claim fails for the same reasons, and also because Hartford did not unreasonably deny an insurance claim. And plaintiff's **elder abuse** claim fails because the statute under which she sues was not in effect when the loans were issued and because Hartford took nothing from her.

Finally, Hartford would be entitled to partial summary judgment on plaintiff's claims relating to the first two loans (because Hartford did not issue them) and on her claims for punitive damages (because Hartford does not deserve punishment) and emotional distress (because she cannot prove she sustained any).

II. BACKGROUND

A. The Policy

In 1988, Dorothy Durbin, then age 58, purchased a single premium adjustable life insurance policy from Pacific Standard Life Insurance Company. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶ 6 & Ex. A, pg. 3.) Issued for a one-time payment of $100,000 -- that is, plaintiff had no continuing premium payments -- the policy had a face value of $326,000 and would mature on May 11, 2025. (*Id.*) Ms. Durbin purchased the policy through third-party defendant Gary Jenkins, who is a family member. [1] (Barnes Decl., ¶¶ 2-3, Ex. A [R. Durbin Depo.], at 28:11-22 & Ex. B [D. Durbin Depo.], at 14:9-15:25.) Plaintiff and her son, Richard, both describe Mr. Jenkins as a "family" member whom they saw on social occasions and trusted completely. (*Id.*, Ex. A [R. Durbin Depo.], at 28:1-22 & Ex. B [D. Durbin Depo.], at 15:5-24 & 31:2-32:1.) In fact, when Mr. Jenkins showed plaintiff many years ago that he could sign her name by tracing her signature, Ms. Durbin did not even ask him why he was doing so. As she put it, "[Gary is] a relative. I don't question relatives." (*Id.*, Ex. B [D. Durbin Depo.], at 30:8-32:1.) Moreover, the "family" connection is the reason the Durbins purchased numerous insurance policies from him. (*Id.*, at 15:19-16:01.) Mr. Jenkins was not then, and has not been since, a Hartford life insurance agent. (Melhorn Decl., ¶ 4.)

Pacific Standard was declared insolvent in 1989, and Hartford assumed its contractual obligations under plaintiff's policy on May 11, 1994. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶¶ 7-9 & Ex. B.)

B. The Loans

Pursuant to the policy's terms, plaintiff was entitled to borrow funds against it, using the policy as collateral. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at Ex. A, pg. 6.) In 1990 and 1992, before Hartford assumed the policy, Pacific Standard issued two loans against the policy. (*Id*. at ¶¶ 11-12.) Those two loans ("Loan 1" and "Loan 2") were in the principal amounts of $9,274.17 (issued October 3, 1990) and $8,894 (issued April 28, 1992), and were delivered to plaintiff at her residence in Jamul. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶¶ 11-12; Erickson Decl., ¶¶ 4, 6 & 8, Ex. A.)

When Hartford assumed the policy in 1994, the total outstanding loan balance (with interest) was $21,177.41. (Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 103:8-11 & Ex. 20.) Three years later, Hartford received a signed request in plaintiff's name for a third loan ("Loan 3") in the amount of $30,000.00, which it funded on October 13, 1997. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶ 13; Barnes Decl., ¶ 6, Ex. E [K. Cowan Depo.], at 94:19-95:19 & Ex. 10.)

Between 1995 and 2012, Hartford mailed plaintiff no fewer than eighteen annual policy reports that specified the total outstanding balance associated with each of the three loans, including accrued interest. (Clasen Decl., ¶ 4-5, Ex. A.) The total outstanding balances for Loan 1 and Loan 2 were set forth in Hartford's 1995 annual report, sent to the family home at 14412 Lyons Valley Road in Jamul. (*Id*.) Similarly, the balance on Loan 3 was set forth in Hartford's May 12, 1998 annual report, also sent to her home. (*Id*.) Each notice reflected all loans outstanding as of its date. (*Id*.) Since 1995, Hartford has sent annual reports displaying the total balances on all three loans to plaintiff, either at her home or in the care of her agent (Mr. Jenkins) at his office. (*Id*.) The following chart lists the addresses where each annual report issued between 1995 and 2012 was sent. (*Id.*; Barnes Decl., ¶¶ 2 & 6, Ex. A [R. Durbin Depo.], at 23:15-16 & Ex. E [K. Cowan Depo.], at 94:19-95:19 & Ex. 10.)

Annual Reports	***Address***	***Description of Location***
1995-1997	14412 Lyons Valley Road, Jamul, California	Plaintiff's Home
1998-2001	P.O. Box 21208, El Cajon, California	Mr. Jenkins's P.O. Box
2002-2004	14412 Lyons Valley Road, Jamul, California	Plaintiff's Home
2005-2007	744 N. 2nd Street, El Cajon, California	Mr. Jenkins's Office
2008-2012	14412 Lyons Valley Road, Jamul, California	Plaintiff's Home

Hartford also sent loan payment notices to plaintiff's home in, at least, 1997, 2003 and 2005. (Clasen Decl., ¶ 6-7, Ex. B) The Durbins have lived at that home since 1969, and have never had any trouble receiving mail there. (Barnes Decl., ¶¶ 2-3, Ex. A [R. Durbin Depo.], at 15:16-17:24 & Ex. B [D. Durbin Depo.], at 8:10-10:17.) Moreover, plaintiff's son, Richard, who moved back home in 1995 to take of her, acknowledged that she received loan premium notices there from Hartford. (Barnes Decl., ¶ 2, Ex. A [R. Durbin Depo.], at 19:21-25:25, 39:10-40:7, 93:13-94:6, 111:18-112:13) Richard acknowledges that his mother was concerned about the payment notices at the time, because she never borrowed money and did not understand why Hartford would claim she owed it money. (*Id.*, Ex. A [R. Durbin Depo.], at 92:20-96:1 & Ex. B [D. Durbin Depo.], at 17:18-18:15; Clasen Decl., ¶ 6-7, Ex. B.) [2]

Although neither Ms. Durbin nor Richard could recall specifically when they received the payment notices from Hartford, Richard acknowledged that they received the notices at their home, then stopped receiving them because they went to Mr. Jenkins's office, and then starting receiving them again after Mr. Jenkins closed his business because he had convicted of a crime and went to jail. (Barnes Decl., ¶ 2, Ex. A [R. Durbin Depo.], at 19:21-26:23, 39:25-40:7.) Court records show that Mr. Jenkins's conviction was in December 2007. (RFJN, Ex. A [Jury Verdict].) Richard's testimony is consistent with the chart showing the dates of Hartford's notices, and confirms that they received Hartford's notices at home in the 2002-2004 period (and likely in the 1995-1997 period), and began receiving them at home again in the 2008-2012 period after Mr. Jenkins went to jail.

C. The Investigation

In early 2009, Ms. Durbin learned through a relative that Mr. Jenkins had been arrested and charged with defrauding an **elderly** couple. (Erickson Decl., ¶¶ 4-5 & 8, Ex. A.) Concerned about her own dealings with Mr. Jenkins, plaintiff decided to review her Hartford life insurance statements and saw the notations listing the three loans against the policy. (*Id.*) Having decided that Mr. Jenkins obtained the loans against the policy in her name and pocketed the proceeds, plaintiff informed Hartford of her suspicions on March 4, 2010 and asked it to send copies of the loan documents to the San Diego County Sheriff's Department, which it did. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶ 14; Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 50:1-51:10 & Ex. 2.)

In April 2011, the Sheriff's Department informed Hartford that it had circumstantial evidence of Mr. Jenkins's fraud, but, because the loan checks (with presumably-forged endorsements) no longer existed, the District Attorney could not bring criminal charges. (Barnes Decl., ¶¶ 4-5, Ex. D [J. Pearson Depo.], at 50:1-51:10 & Ex. 2 & Ex. C [B. Erickson Depo.], at 68:1-11, Ex. 3.)

When the authorities gave up, Hartford pursued its own investigation and, in July 2011, interviewed plaintiff, Mr. Jenkins, Louise Jenkins (his wife and co-worker), and Mr. Jenkins's former assistant, Gudrun Campbell. (Barnes Decl., ¶ 4, Ex. C [B. Erickson Depo.], at 68:1-11, Ex. 3.) After her interview was completed, plaintiff provided Hartford with a signed written statement that tracked her oral responses to its questions. (Erickson Decl., ¶¶ 4 & 8, Ex. A.) In her oral statements to Hartford, which she confirmed in writing, plaintiff stated that she became aware of the loans in 2009, after a mutual relative of her and Mr. Jenkins told her that Mr. Jenkins had been caught defrauding someone else. (*Id.*, ¶¶ 4-5 & 8, Ex. A) At that point, plaintiff decided to read the notices that Hartford had been sending her and that she had been forwarding to Mr. Jenkins at his request. (*Id.*)

As to Loan 1, Ms. Durbin acknowledged that Pacific Standard had sent her some checks, but, at Mr. Jenkins's direction, she had given the checks to him. (Erickson Decl., ¶¶ 4, 6 & 8, Ex. A.) When asked about Loan 2, plaintiff reiterated that she had received checks from Pacific Standard but, on Mr. Jenkins's advice, forwarded the checks to him. (*Id.*)

Plaintiff denied having received the proceeds of Loan 3, the sole loan Hartford had issued, and noted that the application had requested delivery of the loan proceeds to a post office box that was not hers. (Erickson Decl., ¶¶ 4 & 7-8, Ex. A.) Hartford was unable to determine who had endorsed the check for Loan 3, however, because the check was no longer in existence by the time plaintiff reported the suspected fraud. (Barnes Decl., ¶¶ 4-5, Ex. D [J. Pearson Depo.], at 50:1-51:10 & Ex. 2 & Ex. C [B. Erickson Depo.], at 68:1-11, Ex. 3.)

Pursuant to its investigation and the Sheriff's Department's findings, Hartford concluded that, although the evidence was inconclusive without the endorsed check, Ms. Durbin likely did not receive the proceeds from Loan 3 -- the only loan it had issued. (Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 103:8-11 & Ex. 20.) Accordingly, by letter to plaintiff dated October 28, 2011, Hartford offered to pay off Loan 3, totaling $79,026.78 with fourteen years' accrued interest, for a release of liability. (*Id.*) Although the offer was initially valid until November 25, 2011, Hartford extended it to February 17, 2012 at the request of plaintiff's son, Richard. (Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 50:1-51:10 & Ex. 2.) When plaintiff did not respond by February 17, 2012, Hartford reiterated its offer on March 27, 2012, April 26, 2012 and May 31, 2012, receiving no response. (*Id.*)

Richard Durbin, who was handling the negotiations for his mother, clearly understood that Hartford was offering to settle with plaintiff by repaying Loan 3 in exchange for a release of liability as to all three loans. (Barnes Decl., ¶ 2, Ex. A [R. Durbin Depo.], at 59:10-65:10.) After receiving the offer, Richard hired plaintiff's current counsel, Craig Miller, for legal advice. (Barnes Decl., ¶¶ 2 & 7, Ex. A [R. Durbin Depo.], at 72:17-73:14 & Ex. F [K. Melhorn Depo.], at 67:6-15, Ex. 22.) Richard raised no objection to the form of the proposed release, and understood that the policy would remain in force after the settlement, but simply thought the settlement offer was "unfair." (*Id.*, ¶ 2, Ex. A [R. Durbin Depo.], at 59:10-68:9.) He understood that Hartford denied liability for Loan 1 and Loan 2 because it had not issued them, but he "assumed" that Hartford had inherited *all* of Pacific Standard's liabilities when it acquired the policy. (*Id.*)

After consulting with Mr. Miller, Richard let Hartford's offer lapse. (Barnes Decl., ¶ 2, Ex. A [R. Durbin Depo.], at 72:17-73:14, Ex. 22.) Accordingly, on June, 29, 2012, Hartford closed its file. (Barnes Decl., ¶ 7, Ex. F [K. Melhorn Depo.], at 67:6-15, Ex. 22.)

D. This Action

On November 13, 2012, without responding to Hartford's settlement offer, plaintiff commenced the instant suit in the San Diego Superior Court, naming only Hartford and not Mr. Jenkins. (Docket # 1 [Notice of Removal], Ex. A [Compl.].) Hartford subsequently removed the case to federal court. (*Id.*) In her complaint, plaintiff set forth claims for breach of contract, bad faith, and **financial elder abuse**. (*Id.*) Hartford subsequently joined Mr. Jenkins as a third-party defendant. (Docket #14.) Plaintiff has asserted no claims against him.

III. LEGAL STANDARD

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no "genuine" issue concerning a fact if a reasonable fact finder could only come to one conclusion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion[.]" *Celotex*, 477 U.S. at 323. However, if the nonmoving party bears the burden of proof on an issue at trial, the moving party need not produce affirmative evidence of an absence of fact to satisfy its burden. *Id.* The moving party may simply point to the absence of evidence to support the nonmoving party's case. *Id.*; *see also* Fed. R. Civ. P. 56(c)(1)(B) (permitting summary judgment where "an adverse party cannot produce admissible evidence to support the fact"). The nonmoving party must then make a sufficient showing to establish the existence of all elements essential to their case on which they will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. If the nonmoving party fails to make such a showing, summary judgment should be granted because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

IV. ARGUMENT

A. Statutes Of Limitations Foreclose Plaintiff's Claims

As explained above, plaintiff's lawsuit is based on three unauthorized loans that Mr. Jenkins allegedly obtained against her life insurance policy. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶¶ 6-18.) The suit was brought more than fifteen years after Hartford issued the third of those loans, however, and more than twenty-two years after Pacific Standard issued the first one. (*Id.*) Plaintiff has simply acted too late.

1. ***Plaintiff Had To File This Suit By 1999***

A statute of limitations sets the maximum time after an event that legal proceedings based on it may be initiated. *See Shively v. Bozanich*, 31 Cal. 4th 1230, 1246 (2003). The statute of limitations on a written contract (including an insurance policy) is four years. Cal. Civ. Proc. C., § 337. The statute of limitations on a "bad faith" claim is two years. Cal. Civ. Proc. C. § 339(1); *Richardson v. Allstate Ins. Co.*, 117 Cal. App. 3d 8, 13 (1981). Finally, the statute of limitations on a claim for **financial elder abuse** is four years. Cal. Welf. & Inst. C. § 15657.7. Each of those statutes lapsed years, if not decades, before plaintiff brought this action.

As plaintiff admitted to Brian Erickson, Hartford's investigator, she did receive "checks" from Pacific Standard before it became insolvent. Those loans were issued in 1990 and 1992, respectively, and Pacific Standard became insolvent in 1994. Plaintiff claimed that she did not know what to do with the checks, so she asked Mr. Jenkins. Plaintiff was therefore on notice of the loans more than twenty years before she filed suit, but took no action because of a relative's advice. The statutes of limitations therefore would have expired in 1992 and 1994 -- the former before Hartford was even associated with plaintiff's policy.

Even if plaintiff had no contemporaneous knowledge of the loan requests, moreover, the annual policy value statements that Hartford sent her upon assuming the policy placed her on notice of Loan 1 and Loan 2 by May 1995. (Clasen Decl., ¶ 4-5, Ex. A.) It is legally presumed that an item of correspondence was delivered to the address reflected on it. *See* Cal. Evid. Code § 641 ("A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."); *REO Broadcasting Consultants v. Martin*, 69 Cal. App. 4th 489, 497 (1999) ("there is a presumption that a letter correctly addressed and properly mailed has been received in the ordinary course of mail"). Even if Mr. Jenkins did not forward plaintiff the annual statements sent to his office, [3] notices were sent directly to plaintiff's home in 1995, 1996, 1997, 2002, 2003, 2004, 2008, 2009, 2010, 2011 and 2012. Richard Durbin, furthermore, acknowledged that the family received payment requests from Hartford at home *before* the notices began going to Mr. Jenkins's office in the period before his 2007 arrest, and realized that Hartford claimed plaintiff owed it money. This confirms that plaintiff was receiving loan statements at least as early as the 2002-2004 period, since they were sent to Mr. Jenkins from 2005 through 2007.

Even if plaintiff's receipt of the loan proceeds in 1990 and 1992 did not place her on notice of the loans, Hartford's first annual statement in 1995 did. As a result, the longest applicable statute of limitations expired in 1999. That first Hartford notice was followed by additional statements to the home in 1996, 1997, 2002, 2003, 2004, 2008, 2009, and afterward. Even based on Richard's own timeline, he and his mother were discussing her alleged indebtedness to Hartford no later than 2004, and took no action within four years after that. The suit was untimely.

2. ***Any Tolling Argument Would Fail***

Hartford expects plaintiff to argue that some form of "delayed discovery" or "estoppel" tolled application of the statutes. For example, plaintiff will likely argue she had no actual knowledge of the loans because, at Mr. Jenkins's request, she forwarded the notices from Hartford to him. Any such argument would fail.

The lack of actual knowledge does not toll a statute of limitations. Under California law, the "discovery rule" exception "postpones accrual of a cause of action until the plaintiff discovers, *or has reason to discover*, the cause of action." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 463 (1999) (emphasis added). Stated differently, "[u]nder the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110 (1988). Here, plaintiff acknowledged that she received loan checks from Pacific Standard in 1990 and 1992, and her son testified that she received premium notices from Hartford long before December 2007. (Barnes Decl., ¶¶ 2 & 4, Ex. A [R. Durbin Depo.], at 19:21-25:25, 39:10-40:7, 93:13-94:6; Erickson Decl., ¶¶ 4, 6 & 8, Ex. A; RFJN, Ex. A [Jury Verdict].) Accordingly, as early as 1990, Ms. Durbin had reason to suspect "that someone has done something wrong to her." Her decision to disregard the checks and annual statements

on a relative's advice does not negate her receipt or knowledge of them. As her son acknowledged, in fact, she believed she owed Hartford nothing and could not understand why it kept sending her bills.

Accordingly, because plaintiff had reason to discover the loans as early as 1990, and no later than 1995, the discovery rule does not apply.

3. *The Public Policy Underlying The Statutes Of Limitations Supports Their Application Here*

More broadly, the facts of the case illustrate precisely why statutes of limitations exist: to allow the defendant to investigate and evaluate claims before memories fade, witnesses disappear, and documents are lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944); *see also Scherer v. Mark*, 64 Cal. App. 3d 843, 844 (1976) ("The policy behind the statutes of limitations is equally as meritorious a consideration as is the policy of trying cases upon their merits."); *Missouri, Kansas & Texas R. Co. v. Harriman*, 227 U.S. 657, 672 (1913) ("The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory."); *Marin Healthcare Dist. v. Sutter Health*, 103 Cal. App. 4th 861, 872 (2003) (The primary purpose of statutes of limitations is " 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " (quoting *Cutujian v. Benedict Hills Estates Assn.*, 41 Cal. App. 4th 1379, 1387(1996)).)

Here, all three examples in the classic justification of a statute of limitations defense are present: memories have faded, witnesses have disappeared, and documents have been lost.

As to the first, plaintiff is now suffering from dementia, and adamantly denied in her deposition that she wrote the premium checks for the policy, that there *are* any loans against her policy, or that she ever communicated with Hartford about any wrongdoing by Mr. Jenkins. (Barnes Decl., ¶ 2 & 3, Ex. A [R. Durbin Depo.], at 84:11-85:8 & Ex. B [D. Durbin Depo.], at 37:1-38:1, 41:6-8, 81:16-21.) Plaintiff was unable to recognize her own signature on various policy-related documents, including the premium payments, and denied that she even paid the up-front premiums for the policy. (*Id.*, ¶ 3, Ex. B [D. Durbin Depo.], at 80:20-86:8, Exs. 40-42.) A plaintiff's inability to attest to a single material fact contained in her own complaint -- including whether her charging allegations are true or false -- is certainly a detriment to the defendant caused by the delay in suing.

As for the second, the most important documents relevant to the case -- the checks with presumably-forged endorsements -- no longer exist due to the passage of time. (Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 50:1-51:10 & Ex. 2.) In fact, it was for that very reason that the authorities felt there was too little evidence of fraud to prosecute Mr. Jenkins.

Finally, both Hartford's and the Sheriff's Department's investigators were unable locate and interview Kim Jones, who was Mr. Jenkins's assistant at the time the loans were taken out and a potential key witness. (Barnes Decl., ¶ 4, Ex. C [B. Erickson Depo.], at 68:1-11, Ex. 3.)

For all these reasons, it is simply too late for plaintiff to seek recovery.

B. Even If Timely, The Lawsuit Would Still Fail To State A Viable Claim

Even if plaintiff's claims were not time-barred, she would have no basis to recover on the specific legal theories she has pleaded. Hartford addresses each in turn below.

1. *Ms. Durbin Cannot State A Claim For Breach Of Contract*

In her first claim for relief, plaintiff contends that "Hartford has breached its contractual duties by wrongfully reducing the face value and death benefit due under the Policy, and by withholding benefits owed under the Policy as written." (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶ 21.) The problem with plaintiff's argument is two-fold.

First, the contract specifically allowed Hartford to reduce the value of the policy by the loan amounts. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at Ex. A, pg. 6.) Unsurprisingly, then, the complaint identifies no contractual provision that Hartford allegedly breached. So far as the policy language shows, then, the reversal of unauthorized loans is not a benefit Ms. Durbin is contractually owed under her policy. (*Id.* at pg. 1.) Rather, the policy obligates Hartford to "pay the Death Proceeds to the Beneficiary upon receipt . . . of due proof of the Insured's death while th[e] policy was in force." (*Id.*) Currently, the policy is still in force and plaintiff is alive and well. While it is regrettable if the loans proceeds were misappropriated, that does not amount to a breach of contract on Hartford's part.

Furthermore, plaintiff has no damages, an element of any contract claim. *Careau & Co. v. Security Pacific Business Credit*, 222 Cal. App. 3d 1371, 1388 (1990). Rather, plaintiff (or at least her son) is concerned that the full death benefit of the policy will not be paid *in the future* upon her death, because the loan balances will be deducted from the policy's value. Indeed, when Richard Durbin admitted in deposition that his mother incurred no out-of-pocket expenses because of the loans, plaintiff's attorney tried to correct his answer on the record, but could only muster the fact that interest continues to accrue on the loans. (Barnes Decl., ¶ 2, Ex. A [R. Durbin Depo.], 82:3-84:8.) Even while coaching (or testifying for) the witness, counsel acknowledged that the loans had only reduced "[t]he amount that [plaintiff] *theoretically* could access." (*Id.* (emphasis added).) Accordingly, because a breach of contract claim requires *actual* (not theoretical) damages, this cause of action fails as a matter of law.

2. *Plaintiff's Claim Of Bad Faith Also Fails*

Neither does plaintiff have a claim for "bad faith."

In the first place, because "bad faith" is simply a breach of contract without a good reason, there can be no "bad faith" because the contract has not been breached. *Waller v. Truck Ins. Exch.*, 11 Cal. 4th 1, 36 (1995) (the good faith covenant is "a supplement to the express contractual covenants."); *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151-53 (1991) (bad faith liability cannot exist in the absence of its theoretical underpinnings -- a contractual obligation). As discussed above, Hartford did not breach the contract. As a result, it could not have done so in "bad faith."

The second element of a "bad faith" claim is also absent here: unreasonableness. After completing its investigation, even though the statutes of limitations barred recovery and the evidence was "inconclusive," Hartford offered to pay off Loan 3 with interest, asking for nothing more than a release of liability. (Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 103:8-11 & Ex. 20.) Hartford did not offer to pay off Loan 1 or Loan 2 because it did not issue the loans, did not assume Pacific Standard's liability, and acquired the policy with its value already reduced by the value of the first two loans. (*Id.*) An insurer does not act in "bad faith" simply because it reasonably advocates a legal position contrary to the insured's position. *Griffin Dewatering Corp. v. Northern Ins. Co. of New York*, 176 Cal. App. 4th 172, 207 (2009) (rejecting insured's attempt to create a "legal mousetrap" by contending insurer acted in bad faith by promoting its own legal rights).

Third, a *prima facie* "bad faith" claim requires proof of out-of-pocket loss caused by the insurer's wrongful withholding of benefits. *Emerald Bay Community Ass'n v. Golden Eagle Ins. Corp.*, 130 Cal. App. 4th 1078, 1096 (2005) ("To support a bad faith action, plaintiff needed to establish actual **financial** loss, not merely a potential that it may suffer a loss sometime in the future."); *Continental Ins. Co. v. Superior Court*, 37 Cal. App. 4th 69, 85 (1995) ("a claim for emotional distress in a bad faith action cannot stand alone, but must be accompanied by some showing of economic loss."). Here, as plaintiff's own counsel acknowledged, any claim of economic injury to plaintiff is *theoretical*, as the policy's beneficiary has made no claim on the policy or tried to recoup its value through surrender. (Barnes Decl., ¶ 2, Ex. A [R. Durbin Depo.], 82:3-84:8.) Plaintiff's contention is that any *future payments* on the policy will be diminished by the offsets to her account value. As in *Emerald Bay*, there is "merely a potential that [she] may suffer a loss sometime in the future" and no bad faith claim is therefore available.

Finally, the "bad faith" doctrine is inapplicable here because it does not involve an insurance claim. Under California law, a "bad faith" claim can only arise from the wrongful denial of an insurance *claim* under the policy, not from some other dispute over the policy. *Jonathan Neil & Assoc. v. Jones*, 33 Cal. 4th 917, 939 (2004) (insurer's pursuit of premiums cannot support bad faith claim); *Tilbury Constrs., Inc. v. State Comp. Ins. Fund*, 137 Cal. App. 4th 466, 478, 480 (2006) (failure to pursue subrogation); *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 279 (2005) (suit for reimbursement of payments). Plaintiff's dispute with Hartford does not involve the denial of an insurance claim, but involves a lending transaction in which her policy was used as collateral for a personal loan. Because plaintiff has made no claim for insurance benefits, the implied covenant of good faith and fair dealing is not implicated. *Progressive West*, 135 Cal. App. 4th at 279 (because bad faith focuses on the prompt payment of benefits due under an insurance policy, "there is no cause of action for breach of the covenant of good faith and fair dealing when no benefits are due.").

3. *Plaintiff's Elder Abuse Claim Is Baseless*

Finally, plaintiff contends Hartford committed **financial elder abuse** by "wrongfully and intentionally reduc[ing] the face value and death benefits due under Ms. Durbin's Policy." (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶ 33.) Because **financial elder abuse** did not exist until 1998, plaintiff's claim fails. Even under the current version of the statute, however, she could not claim **financial** bad faith because Hartford took nothing from her.

a) Statutory Financial Elder Abuse Did Not Exist Until 1998

Under California law, the version of the **Elder Abuse** Act in effect at the time of the wrongful act governs. *Das v. Bank of Am., N.A.*, 186 Cal. App. 4th 727, 737 (2010); *In Re Campos*, 2012 WL 2324398, *4 (N.D. Cal., June 18, 2012). Here, because the loss involves loans issued against the policy, the **Elder Abuse** Act as it existed in 1990, 1992 and 1997 applies.

The concept of economic **abuse** of **elders** was added to the statute in 1991. *Covenant Care, Inc. v. Superior Court*, 32 Cal. 4th 771, 779 (2004). In relevant part, the legislature added remedies for "fiduciary **abuse**," defined as:

> a situation in which any person who has the care or custody of, or who *stands in a position of trust to*, an **elder** or a dependent adult, takes, secretes, or appropriates their money or property, to any use or purpose not in the due and lawful execution of his or her trust.

Cal. Wel. & Inst. § 15657 (1992). In 1998, the term "fiduciary **abuse**" was replaced by "**financial abuse**," broadening the proscriptions beyond fiduciaries. *McIntosh v. Mathison*, 2011 WL 1535401, at *11 (Cal. App. 1 Dist., April 25, 2011.) Hartford could not be liable for "**financial abuse**" based on actions taken before the amendment, but could only be liable for "fiduciary **abuse**" -- the statute that existed until 1998.

With respect to Loan 1 and Loan 2, Hartford had *no* relationship with plaintiff, much less a fiduciary one, because it did not issue the loans. As for Loan 3, the insurer-insured relationship is *not* a fiduciary one in California. *Vu v. Prudential Prop. & Cas. Ins.*, 26 Cal. 4th 1142, 1150-51 (2001) ("The insurer-insured relationship . . . is not a true 'fiduciary relationship' "); *Henry v. Associated Indem. Corp.*, 217 Cal. App. 3d 1405, 1418-19 (1990) (affirming dismissal of fiduciary duty claim against insurer without leave to amend); *Morris v. Paul Revere Life Ins. Co.*, 109 Cal. App. 4th 966, 973 (2003) ("An insurer is not a fiduciary, and owes no obligation to consider the interests of its insured above its own.").

Because Hartford could not have committed "fiduciary **abuse**," it could not have committed **Elder Abuse** under the statutes in effect when the loans were issued.

b) Hartford Took No Monies Or Property From Plaintiff

Additionally, Hartford committed no **Elder Abuse** under *any* iteration of the act because it never took anything from ("**abused**") plaintiff. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶ 11-13.)

Welfare and Institutions Code section 15610.30 currently states in pertinent part that "**financial abuse**" of an **elder** occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both." Hartford took nothing from plaintiff "for a wrongful use or with intent to defraud." Indeed, the only party from whom any money was "taken" was *Hartford*. The proceeds of Loan 1 and Loan 2 were taken from Pacific Standard. (Barnes Decl., ¶ 5, Ex. D [J. Pearson Depo.], at 103:8-11 & Ex. 20.)[4] Hartford certainly took nothing from plaintiff "for a wrongful use or with intent to defraud": it issued a loan to her. If the proceeds were intercepted by Mr. Jenkins, as plaintiff contends, then Hartford was just as much (if not more of) a victim of Mr. Jenkins's fraud as is plaintiff. The reduction of a policy value by the amount of a loan against it (even a fraudulent one) is not a "wrongful use" of property and evinces no "intent to defraud" on the part of the *lender*.

C. Individual Damages Elements Have No Merit

Even if the Court finds triable issues of fact as to one or more of plaintiff's claims for relief, at the very minimum, the case can be narrowed by the elimination of three elements of damages for which no factual basis exists: (1) liability for Loan 1 and Loan 2; (2) plaintiff's claim for damages for emotional distress; and (3) her claim for punitive damages.

1. *Hartford Had Nothing To Do With Loan 1 Or Loan 2*

First, Hartford had nothing whatsoever to do with Loan 1 or Loan 2. As a result, the only transaction that is even arguably at issue is Loan 3.

As noted above, Loan 1 and Loan 2 were extended in 1990 and 1992, respectively. (Docket # 1 [Notice of Removal], Ex. A [Compl.], at ¶¶ 11-12.) At that time, plaintiff's insurer was Pacific Standard, and her agent was Mr. Jenkins. (*Id*. at Ex. A; Barnes Decl., ¶¶ 2-3, Ex. B [D. Durbin Depo.], at 14:9-15:24 & Ex. A [R. Durbin Depo.], at 28:11-22.) Hartford was not plaintiff's insurer, and Mr. Jenkins was not then (and is not now) a Hartford agent.[5] (Melhorn Decl., ¶ 4.) As a result, plaintiff cannot argue that Mr. Jenkins's defalcation is in any way attributable to Hartford.

Whereas Richard Durbin "assumed" that Hartford had inherited all of Pacific Standard's liabilities, which is why he would not accept its settlement offer, his assumption was simply wrong. The Agreement and Plan of Rehabilitation in Connection with the Rehabilitation of Pacific Standard ("Agreement") limits the liability assumed by Hartford to "Contract Liability" arising under the assumed contracts. (Melhorn Decl., ¶ 5, Ex. A.) "Contract Liability" meant "those liabilities or obligations of [Pacific Standard] arising under the express terms and conditions of the Assumed Contracts, but excluding all Retained Liabilities." "Retained Liabilities" meant "any liability or obligation of the Company or the Conservator that is not a Contract Liability, . . . including, without limitation, . . . (iv) Extracontractual Obligations[.]" (*Id*.) In short, any liability for pre-assumption conduct was not assumed by Hartford, and was extinguished with Pacific Standard's demise.

And in any event, plaintiff admitted that she received the proceeds for Loan 1 and Loan 2, and elected to give them to Mr. Jenkins. (Erickson Decl., ¶¶ 4, 6 & 8, Ex. A.) Hartford cannot be responsible for *that* decision.

2. *There Is No Basis For An Award of Emotional Distress Damages*

Second, Ms. Durbin cannot prove she suffered any emotional distress as a result of the loans because she has no knowledge of them.

As plaintiff testified in her deposition, she has no knowledge that Mr. Jenkins fraudulently used her policy as collateral to take out the three loans at issue in her complaint. (Barnes Decl., ¶ 3, Ex. B [D. Durbin Depo.], at 37:1-38:1, 41:6-8.) In fact, Ms. Durbin failed to recall speaking to Hartford regarding any wrongdoing by Mr. Jenkins or even any loan that was issued against her policy. (*Id.*) Accordingly, because Ms. Durbin has no knowledge of the loans, she cannot establish that Hartford's conduct relating to them caused her any emotional distress.

3. *There Is No Basis For An Award of Punitive Damages*

Finally, even if plaintiff had a viable tort claim, that alone would not entitle her to punitive damages.

As stated in *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355 (1976), "[t]he law does not favor punitive damages and they should be granted with the greatest caution." To survive summary judgment, plaintiff has to show by "clear and convincing evidence" that Hartford was guilty of "oppression, fraud or malice." *See* Cal. Civ. Code § 3294; *Basich v. Allstate Ins. Co.*, 87 Cal. App. 4th 1112, 1118-1121 (2001). "Clear and convincing" evidence is evidence "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." *Mock v. Michigan Millers Mut. Ins. Co.*, 4 Cal. App. 4th 306, 332 (1992);

In addition to meeting a "clear and convincing" evidence standard, plaintiff must prove that Hartford's conduct was "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1287 (1994); *see also Shade Foods v. Innovative Products Sales & Marketing Inc.*, 78 Cal. App. 4th 847, 909-910 (2000) (although the insurer "unquestionably misled" the insured and "lacked any reasonable justification" to question liability, punitive damages were improper).

Measured against these strict standards, no evidence -- let alone clear and convincing evidence -- would support punitive damages here. At most, the undisputed facts show Hartford issued (and then offered to pay back) a loan based on a fraudulent request by plaintiff's agent. Hartford simply requested a release, which is not exactly revolutionary in the context of settling legal disputes. Hartford's conduct was hardly "evil" or "criminal," and hence cannot support punitive damages.

V. CONCLUSION

It is highly regrettable if plaintiff was victimized by her insurance agent, but her claims against Hartford are simply time-barred. Even if that were not the case, Hartford has breached no provision of her insurance policy and took no money from her. As a result, Hartford respectfully request that the Court grant summary judgment in its favor or, in the alternative, grant partial summary judgment on such issues for which no trial is justified.

Dated: January 13, 2014

Respectfully submitted,

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Footnotes

1 Mr. Jenkins is plaintiff's daughter-in-law's uncle. (Barnes Decl., ¶ 3, Ex. B [D. Durbin Depo.], at 15:19-24.)

2 As noted above, the policy's premium was 100% prepaid, so plaintiff had no continuing premium obligations to Hartford.

3 Because Mr. Jenkins was acting as plaintiff's agent, she had constructive notice of the notices sent to his office in any event. Cal. Civ. Code § 2332; *O'Riordan v. Federal Kemper Life Assurance*, 36 Cal. 4th 281, 288 (2005) ("As a general rule, an agent has a duty to disclose material matters to his or her principal, and the actual knowledge of the agent is imputed to the principal." (Quoting Cal. Civ. Code. § 2332)).

4 For what it is worth, plaintiff was not an "**elder**" (aged 65 or older) when those loans were extended in 1990 and 1992. See Cal. Welf. & Inst. C., §15610 (1992). Ms. Durbin was born in 1929, and turned 65 in 1994. (Barnes Decl., ¶ 3, Ex. B [D. Durbin Depo.], at 7:22-23.)

5 At the risk of stating the obvious, defrauding Hartford by impersonating an insured would not have been within the scope of Mr. Jenkins's authority even if he were its agent. *See* Cal. Civ. C. § 2306 ("An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a *fraud upon the principal*.") (emphasis supplied).

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